



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

October 23, 1998

Mr. Jim Loyd  
Executive Director  
Texas Health Care Information Council  
4900 North Lamar, Room 3407  
Austin, Texas 78751-2399

OR98-2488

Dear Mr. Loyd:

On behalf of the Texas Health Care Information Council (the "council"), you ask whether you may release data relating to physician payment arrangements that is obtained by the council pursuant to section 108.009 of the Health and Safety Code or whether such data is made confidential by article 20A.04 of the Insurance Code. Your request was assigned ID# 111842.

The council was established to "develop a statewide health care data collection system to collect health care charges, utilization data, provider quality data, and outcome data to facilitate the promotion and accessibility of cost-effective, good quality health care." Health & Safety Code § 108.006(a). The council collects, disseminates, and analyzes the data it receives to assure that public use data is made available and accessible to interested persons. *Id.* §§ 108.006(a)(1), (6), 108.011. In addition, the council is required by its enabling statute to make reports to the legislature, the governor, and the public on the charges and rate of change in the charges for health care services in Texas as well as the quality and effectiveness of health care and access to health care for all citizens of Texas. *Id.* § 108.006(a)(9). The physician payment arrangement, about which you ask, is gathered by the council to effectuate its purpose. *Id.* § 108.009.

Section 108.009(o) of the Health and Safety Code requires a provider of a health benefit plan, such as a health maintenance organization ("HMO"), to "annually submit to the council aggregate data by service area required by the Health Plan Employer Data Information Set (HEDIS)." You explain that the HEDIS data include information relating to compensation arrangements that HMOs have with physicians. You have submitted a form

entitled, "Table 8B: Physician Payment Arrangement," on which HMOs report their physician compensation methodologies. The HMOs must report the number of physicians who receive the following types of compensation arrangements: salary, fee-for-service, or capitation. The range of bonuses or withholds, expressed as percentages, that an HMO uses must also be reported. The council is required to provide the data collected in accordance with section 108.009(o) to anyone who requests it. *Id.* § 108.011(a). Despite this public release provision, you are concerned that article 20A.04(a)(15) of the Insurance Code conflicts with section 108.011 and makes the HEDIS data, specifically the physician payment arrangements in the hands of the council, confidential.

Article 20A of the Insurance Code governs the regulation of HMOs in Texas by the Texas Department of Insurance (the "department"). Article 20A.04(a)(15) provides that an application for a certificate of authority to establish and operate an HMO shall be on a form prescribed by the Commissioner of Insurance (the "commissioner") and shall set forth or be accompanied by, among other things,

a written description of the types of compensation arrangements, such as compensation based on fee-for-service arrangements, risk-sharing arrangements, or capitated risk arrangements, made or to be made with physicians and providers in exchange for the provision of or an arrangement to provide health care services to enrollees, including any financial incentives for physicians and providers; such compensation arrangements shall be confidential and not subject to the open records law, Chapter 552, Government Code.

Ins. Code art. 20A.04(a)(15); *see also* 28 T.A.C. § 11.204(19). Furthermore, any contract, agreement, or other arrangement between an HMO and a physician or provider that an HMO provides to the commissioner upon the request of the commissioner shall be deemed confidential and not subject to the open records law, Chapter 552 of the Government Code. Ins. Code art. 20A.17(b)(2).<sup>1</sup> The confidentiality provisions found in articles 20A.04(a)(15) and 20A.17(b)(2) apply to the commissioner and the department, not the council.

On the other hand, the council and its actions are governed by chapter 108 of the Health and Safety Code. The purpose of the council is to develop a statewide health care data collection system to facilitate the promotion and accessibility of cost-effective, good quality health care. Health & Safety Code § 108.006(a). In implementing its data collection

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<sup>1</sup>Article 20A.17(b)(2) is inapplicable here and does not make the HEDIS data confidential. The HEDIS information that an HMO is required to submit to the council under section 108.009(o) of the Health and Safety Code is not a "copy of any contract, agreement, or other arrangement between a health maintenance organization and a physician or provider . . . [that is] provided to the commissioner by the health maintenance organization on the request of the commissioner." Ins. Code art. 20A.17(b)(2).

system, the council has a duty to disseminate the data it collects to the public. *Id.* § 108.006(a)(1), (6), (9); *see id.* § 108.0045 (except as otherwise provided by chapter 108, council is subject to Open Records Act). In fact, the HEDIS data that the council collects under section 108.009(o) is expressly made public by section 108.011(a) which provides that the council shall promptly provide the information to anyone who requests it. *Id.* § 108.011(a); *see id.* § 108.002(4) (“data” means information collected under section 108.009 in the form initially received). Moreover, the council’s governing statute provides that, subject to certain limitations, “the council shall make determinations on requests for information in favor of access.” *Id.* § 108.013(a).

Although both the department and the council collect information that relates to physician compensation arrangements, the two statutes governing each agency have different purposes, and therefore, provide different release requirements. Under article 20A of the Insurance Code, the department regulates and monitors the operation and quality of HMOs in Texas. The department must keep confidential a detailed, written description of a compensation arrangement between an HMO and a physician. Ins. Code arts. 20A.04(a)(15), 20A.17(b)(2). Much of this information may identify particular providers and physicians. Under chapter 108 of the Health and Safety Code, the council exists to collect, maintain, and disseminate information relating to health care services to the public. “The data received by the council shall be used by the council for the benefit of the public.” Health & Safety Code § 108.013(a). The council’s governing provisions mandate public release of the aggregate HEDIS data, *id.* § 108.011(a), and weigh strongly in favor of public release of health-care related information, *id.* §§ 108.006(a)(6), (9), 108.013(a).

Second, although both statutes address information concerning physician compensation arrangements, the HEDIS information submitted to the council is substantially different from the information which is submitted to the commissioner for a certificate of authority. Thus, because the information contemplated by section 108.009(o) of the Health and Safety Code and article 20A.04(a)(15) of the Insurance Code is dissimilar, the two provisions do not conflict. The HEDIS data are general in nature. They consist of a summary of the numbers and percentages relating to an HMO’s compensation arrangements with all of its physicians and not with any particular physician. Hence, the information is prepared and submitted in the aggregate and does not reveal the identity of a specific patient or physician. Such detailed information is expressly protected from release by section 108.013 of the Health and Safety Code. The council is prohibited from releasing any data

(1) that could reasonably be expected to reveal the identity of a patient or physician or that reveals the zip code of a patient’s primary residence;

(2) disclosing provider discounts or differentials between payments and billed charges; or

(3) relating to actual payments to an identified provider made by a payer.

Health & Safety Code § 108.013(c). *See id.* § 108.013(g) (council may not release data elements in manner that will reveal identity of patient or physician).

Contrarily, the information required by article 20A.04(a)(15) is specific and detailed. An HMO must provide written descriptions of the types of compensation arrangements it has with any of its physicians or providers. In its report to the Seventy-fifth Legislature, the Senate Interim Committee on Managed Care and Consumer Protections provided that “[t]he department of [insurance] has access to numerical ranges used in compensation arrangements, however, these range statements are often very broad. It is difficult to determine how compensation may affect the provision of health care services without knowing the specific contractual arrangements.” SENATE INTERIM COMMITTEE ON MANAGED CARE AND CONSUMER PROTECTIONS, A REPORT TO THE 75<sup>TH</sup> LEGISLATURE (December 1996) at 15. Thus, the committee recommended that an HMO be required “to submit written disclosure of *specific* compensation arrangements, including financial incentives for physicians and provider to TDI.” *Id.* Therefore, we believe that the legislature contemplated two different types of information for each statute. One type is specific for the regulatory needs of the department, and the other type is more general for release to the public.

Because the scope of information covered by each statute differs, there is no conflict between the two provisions. Release of the HEDIS data is governed by section 108.011(a) of the Health and Safety Code, which provides for the public release of the data, not article 20A.04(a)(15) of the Insurance Code. The information relating to physician compensation arrangements that the council collects must be released to the public as provided by section 108.011(a) of the Health and Safety Code.

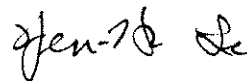
Finally, in subsequent correspondence to this office, you also suggest that some of the HEDIS information may be withheld from the public pursuant to section 552.110 of the Government Code, which excepts from required public disclosure “[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” This office must normally accept a claim that information is excepted from public disclosure as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990). Similarly, this office will normally accept a claim that information is excepted from public disclosure as “commercial or financial information” upon a showing that the release of the information is likely to either 1) impair the government’s ability to obtain necessary information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. Open Records Decision No. 639 (1996).

As noted above, however, section 108.011(a) of the Health and Safety Code requires the council to make the HEDIS information available to the public. Information specifically

made public by statute may not be withheld from the public pursuant to the exceptions to required public disclosure listed in the Open Records Act. Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). *See also Houston Chronicle Publ'g Co. v. Woods*, 949 S.W.2d 492, 497 (Tex. App.--Beaumont 1997, orig. proceeding) (where language of statute making information public is unambiguous, such information must be released "without any exceptions"). Consequently, because section 108.011(a) specifically makes the HEDIS data public, none of this information is subject to the protection of section 552.110 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

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Ref.: ID# 111842

Enclosures: Submitted documents

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